

Physician Advertising in the Spotlight

by Greg Werre & Peter Osinoff

Whereas advertising by cosmetic surgeons has been commonplace for many years, physicians of other specialties have turned to advertising as a means to maintain and expand private practices.

Perhaps no specialty in the last ten years has embraced advertising more than ophthalmologists who perform laser in situ keratomileusis (LASIK). Advertising regarding LASIK has become commonplace on the radio, in print media, in advertisements through the mail, and on the internet. As LASIK surgeons compete for a diminishing pool of surgical candidates, advertising has become more of a necessity in order to maintain a LASIK practice.

The competitive nature of the LASIK industry and number of complaints regarding physician advertising have caused the Medical Board of California to devote resources to the enforcement of physician advertising. Though advertising has become a practice necessity for many LASIK surgeons, California statutory law regarding misleading and deceptive physician advertising may not be well understood. Unfortunately, a significant percentage of the advertisements more recently have run afoul of California statutory law which prohibits deceptive advertising by physicians. It is thus prudent for any physician to avoid potentially misleading or deceptive advertising, and to be mindful of California statutory law when engaging in physician advertising.

Advertising one's professional services is permitted under the law. United States Supreme Court opinions have made it clear that professional advertising is entitled to substantial First Amendment protection.

To the extent that a physician's free speech rights protected by the First Amendment are broader than the right to advertise expressly permitted by state law, the First Amendment rights would supersede state law. See *Edenfield vs. Fane*, 507 U.S. 761 (1993). However, the Supreme Court has also emphasized that First Amendment protection does not extend to misleading or deceptive advertising. See *Peel vs. Attorney Disciplinary Committee*, 496 U.S. 91 (1990).

The California statute which specifically governs physician advertising is Business and Professions Code section 651. Although section 651 affirmatively authorizes a broad range of physician advertising, it contains a strict prohibition against false, fraudulent, misleading or deceptive advertising. Any misrepresentation of fact is prohibited. Section 651 includes the following rules:

- (1) Any advertisement likely to mislead or deceive because of a failure to disclose material facts is prohibited. For example, advertising a "free consult," but providing a consult with a non-physician, has been considered misleading.
- (2) Any photograph or other image of a model without clearly stating in a prominent location and in easily readable type that the photograph or image depicts a model is prohibited.
- (3) Before and after images of a patient must be comparable in presentation so that the results are not distorted by favorable poses, lighting, makeup, hairdo, or other means, and shall contain a statement that the same results may not occur for all patients.
- (4) Advertising of professional superiority or of performing services in a superior manner is prohibited unless such claim can

be substantiated with objective scientific evidence. A claim that a particular physician has more experience performing LASIK than any other doctor or has performed more LASIK procedures than any other doctor is prohibited, unless the claim can be substantiated with objective scientific evidence. Such objective substantiation almost never exists, thereby making such claims of superiority almost always illegal.

(5) Price advertising must be exact for each product or service referenced, without the use of phrases such as "lowest prices," "and up," and "as low as." Advertising a "discounted" price is generally fraught with problems. For example, it has been common practice for LASIK surgeons to advertise LASIK "starting at" \$599, or "as low as" \$499. The Medical Board of California with regularity takes action to cease such advertising by sending a written notice to the offending physician.

(6) A physician may include a statement that he or she is certified by one of the American Board of Medical Specialties (ABMS), but the full name of the board must be identified in the advertisement. A physician cannot advertise board certification by a professional organization that is not recognized by the ABMS.

Violation of Business and Professions Code section 651 can result in an administrative fine up to \$10,000 per "event," i.e., each violation. The Attorney General has the authority to commence legal proceedings to enjoin prohibited advertisements and to seek other appropriate relief. The cost of enforcement may be awarded against a physician found to have engaged in misleading or deceptive advertising.

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The Medical Board has engaged in efforts to crack down on prohibited physician advertising in part because of complaints filed by or on behalf of LASIK surgeons against other LASIK surgeons. This is probably a reflection of the competitive nature of the industry. Due to limited resources, the Medical Board generally investigates complaints only if the evidence demonstrates that the prohibited advertising occurred recently or is ongoing. In addition, the Board usually issues a letter providing an opportunity to comply before initiating action against the licensee. A prompt reply and showing of compliance should be made, and the retention of experienced counsel can provide valuable assistance. In addition to advertisements in traditional media, the Medical Board will scrutinize a physician's website for compliance issues, once a complaint has been received by the Medical Board. So, if a complaint about a

particular advertisement has come to a physician's attention, the physician should examine his/her website with counsel to ensure compliance with the above rules.

Failure to respond to the Medical Board's compliance request, or a subsequent advertising violation, will likely result in a citation and fine by the Board, which is not considered a disciplinary action, but is posted on the Board's website and publicly available for five years. Further violations may result in disciplinary action by the Board. If the practitioner has a pending quality of care or other type of complaint with the Board, unrelated advertising violations may be added to the investigation and may be incorporated into any disciplinary action, complicating resolution of the matter for the physician. Thus, we recommend that each physician's current advertising and internet sites be reviewed for compliance with section 651. ■

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Bonne Bridges has more than 40 years experience representing the healthcare community in licensing board matters. The Administrative Law Department provides advice and representation to physicians and allied healthcare professionals in disciplinary proceedings brought by the Medical Board of California and other California licensing boards. We defend individual healthcare providers in actions by state and federal agencies, as well as in proposed adverse actions by health care plans, HMO's, and hospitals.

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